Nos. 83-1386, 83-1721 and 83-1838

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OCTOBER TERM, 1983

RONALD A. LEGGETT, *et al.*,
STATE OF MISSOURI, *et al.*,
and
NORTH ST. LOUIS PARENTS AND CITIZENS FOR QUALITY EDUCATION, *et al.*,
Petitioners,

v.

CRATON LIDDELL, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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QUESTIONS PRESENTED

1. Whether a court order pursuant to *Hills v. Gautreaux*, 425 U.S. 284 (1976), requiring the State to fund voluntary interdistrict transfers between the City and consenting suburban districts in order to help remedy the *de jure* segregated school system which the State has been found guilty of creating and helping to maintain in the City, presents an issue warranting review, particularly where the Court of Appeals has twice approved similar orders calling for the funding of such voluntary transfers and this Court has twice denied certiorari.

2. Whether a court order requiring the funding of compensatory education and other remedies in order to help eliminate the vestiges of a *de jure* segregated school system, based upon a detailed review of the particular facts in the record of this case and pursuant to this Court's decision in *Milliken v. Bradley*, 433 U.S. 267 (1977), presents an issue warranting review.

3. Whether an appellate court ruling which holds that a district court order deferring a tax rate decrease must be dissolved unless further proceedings demonstrate that such a deferral is the only way to fund a remedy for a constitutional violation presents an issue warranting review simply because the Court of Appeals continued the deferral in effect as an interim measure for the duration of the 1983-84 school year, in accord with this Court's prior decisions concerning interim remedies.

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RESPONDENTS' BRIEF IN OPPOSITION

Petitioners, the City of St. Louis and certain City officials (hereinafter "City"), the State of Missouri and certain State officials (hereinafter "State"), and the North St. Louis Parents and Citizens for Quality Education and certain members of that association (hereinafter "Association"), have asked this Court to grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit *en banc*, entered on February 8, 1984. The City and State Petitioners challenge the provisions for financing a settlement agreement entered into by black plaintiffs as class representatives, the Board of Education of the City of St. Louis, and all twenty-three St. Louis County school districts. The agreement was approved by the District Court on July 5, 1983. Acting on the basis of existing findings of liability against the State of Missouri and the City Board, the District Court also entered an order to fund the agreement. The Dis-

trict Court's order was approved with modifications by the Court of Appeals.[1] The voluntary desegregation plan embodied in the agreement has been operating successfully since September, 1983.

On three previous occasions, this Court has denied requests to review earlier decisions in this case raising most of the same issues which Petitioners present here. Because the decision below is correct and does not raise any questions warranting review by this Court, Respondents Craton Liddell, *et al.* (hereinafter "Liddell Respondents"), Respondents Earline Caldwell, *et al.* (hereinafter "Caldwell Respondents"), Respondents Board of Education of the City of St. Louis, Missouri, its members, officers, and administrators (hereinafter "City Board"), the St. Louis County school district Respondents listed herein, and Respondent St. Louis Teachers Union urge this Court to deny the pending petitions.

STATEMENT OF THE CASE

The "Statement of the Case" set forth in the State's petition implies that the courts below imposed on an innocent state government the obligation to fund a massive, mandatory cross-district busing order for the purpose of ensuring a better racial balance in a unitary school system. The City's petition further suggests that the courts below ordered a tax increase to help finance the plan.

In fact, however, the State is not innocent, the City schools are not unitary, the desegregation plan is not

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[1] The Eighth Circuit's opinion is reported at 731 F.2d 1294 and is reprinted in Appendix ("City App.") K to the Petition for a Writ of Certiorari filed by the City ("City Pet.") and in Appendix ("State App.") A to the Petition for a Writ of Certiorari filed by the State ("State Pet."). The decision of the District Court which was reviewed by the Eighth Circuit is reported at 567 F. Supp. 1037 and is reprinted in City App. A and in State App. B. A supplemental order issued by the Eighth Circuit on March 5, 1984 is reported at 731 F.2d 1336 and is reprinted in Appendix B to the Supplemental Brief of the City.

mandatory, and no tax increase was ordered. What in fact happened below was that the State—which had been found liable after trial, along with the City Board, for creating, maintaining, and failing to dismantle a *de jure* racially dual school system in the City of St. Louis whose vestiges remain unliquidated today—was ordered to help fund a voluntary desegregation plan worked out between the City Board and all 23 surrounding St. Louis County school districts. The plan gives black students attending the remaining unconstitutionally segregated schools in the City a choice between volunteering to attend majority white schools in county districts or schools in the City that are free to the maximum extent practical from the vestiges of past discrimination. No child will be forced to be "bused" anywhere. Contrary to the impression left by the City, neither the Court of Appeals nor the District Court ordered the City Board or any other entity to increase the tax rate previously approved by the voters. Instead, both courts specifically held that no court-ordered tax increase would be proper unless and until it is proven essential to remedy unconstitutional segregation and its vestiges. These facts, along with the other relevant facts in this case, are set forth in more detail below.

The Establishment of State and City Board Liability for School Segregation in St. Louis

In 1980, the Eighth Circuit held that the State and the City Board had failed to discharge their constitutional duty to eliminate the vestiges of the pre-1954 *de jure* racially dual school system in the City of St. Louis. The court found that, as a consequence of the constitutional violation, 77% of the City schools remained more than 90% one-race. *Adams v. United States*, 620 F.2d 1277, 1285 (8th Cir.) (*en banc*), *cert. denied*, 449 U.S. 826 (1980). The court's ruling was based upon an extensive record compiled during lengthy litigation in the District Court, including over 7,000 pages of transcript and some 1,200 exhibits. Both the City Board and the

City of St. Louis, as well as the State, participated as parties in that trial. *Id.* at 1283 n.5.[2] The 23 St. Louis County school districts were not parties at that time. This Court denied a petition for a writ of certiorari. *Adams v. United States*, 449 U.S. 826 (1980).

The Court of Appeals' 1980 opinion specifically held that the State played a significant role in the creation and maintenance of segregation within the City of St. Louis. "Separate schools were maintained by the St. Louis Board of Education pursuant to [state] legislation and the state constitution." *Id.*, 620 F.2d at 1280. A series of state laws and constitutional provisions had created the "state-mandated segregated system," and a number of these provisions remained on the books after 1954, some as late as 1976. *Id.* at 1281, 1280. In addition, the court noted that "discriminatory restrictions against blacks were enforced by the courts and agencies of the State of Missouri" prior to 1954, which "intensified racial segregation" in St. Louis. *Id.* at 1291 n.21. The court held that after 1954, the State failed to take "prompt and effective steps" to dismantle the dual system, and the St. Louis City schools remained segregated. City App. K at p. A-408c.

The Eighth Circuit's 1980 opinion ordered the District Court to implement a "system-wide" remedy for the "system-wide" constitutional violation, including mandatory student reassignments. *Adams v. United States*,

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[2] Prior to trial, the State was added as a defendant and the City was permitted to intervene as a separate party. Under Missouri law, respondent City Board is an independent, elected public body which has its own taxing authority and sets its own tax rate for school purposes, subject to numerous restrictions imposed by State law. *See* Mo. Rev. Stat. § 164.011; Mo. Const. art. X, § 11(c). Although the City of St. Louis shares boundaries, taxpayers, and constituents with the City Board, it is a separate political entity from the City Board and is separate both geographically and politically from St. Louis County. Once the City Board sets its tax rate, the City's role is limited to the ministerial function of collecting taxes on behalf of, and distributing revenues to, the City Board.

supra, 620 F.2d at 1291, 1295. The Court of Appeals recognized, however, that any feasible remedy limited to mandatory reassignment could not effectively desegregate the schools and remove the vestiges of the dual system. *Id.* at 1296. The court found that a so-called "racial balance" plan, which would have required virtually every St. Louis City school to mirror the racial composition of the system as a whole, was impractical in light of the District Court's finding that its probable result "would be an all-black school system in a few years." *Id.* at 1295. *Accord*, City App. K at p. A-416-417. At the same time, the court noted that under any of the available alternatives, some black St. Louis students would remain in one-race schools. *Id.* at 1296. The appellate court accordingly directed the trial judge to consider the use of other remedial techniques to provide relief to black St. Louis students, including the implementation of compensatory and remedial educational programs pursuant to *Milliken v. Bradley*, 433 U.S. 267 (1977) (*"Milliken II"*), and voluntary student exchanges with suburban school districts. *Adams v. United States*, *supra*, 620 F.2d at 1296-97.

The District Court's 1980 Findings and Order

On remand, the District Court conducted additional hearings, made supplemental findings, and issued a desegregation order based on a plan developed by the City Board effective for the 1980-81 school year. *Liddell v. Board of Education*, 491 F. Supp. 351 (E.D. Mo. 1980), *aff'd*, 667 F.2d 643 (8th Cir.), *cert. denied*, 454 U.S. 1081 (1981). Again, the State participated fully in these hearings. Among its other findings, the District Court specifically held that the State had previously "mandated school segregation," that it "never took any effective steps to dismantle the dual system it had compelled by constitution, statutory law, practice and policy," and that it was a "primary constitutional wrongdoer" with respect to the "segregated conditions in the St. Louis public

schools." *Id.* at 357, 359, 360.[3] The court accordingly ordered the State defendants and the City Board, which had been found to be "jointly and severally liable," each to pay part of the costs of the desegregation plan. *Id.* at 352-53, 357, 359.

In addition to some mandatory reassignment of pupils, the 1980 desegregation plan included magnet schools, improvements in the overall quality of education in the City schools, and the implementation of remedial and compensatory programs for students remaining in primarily one-race schools. *Id.* at 357. Pursuant to the Court of Appeals' mandate to consider techniques for providing additional relief to students remaining in segregated schools, the District Court's order also called for the development of a "voluntary, cooperative plan of pupil exchanges" between the City school district and the surrounding St. Louis County districts. *Id.* at 353 (paragraph 12(a)). The Eighth Circuit affirmed the District Court's order in all respects, and this Court denied certiorari. 454 U.S. 1081 (1981).

The Interdistrict Claims and the Further Implementation of the 1980 Order

In January, 1981, the Caldwell Respondents and the City Board filed motions to add suburban districts to the litigation and to bring claims for interdistrict remedies, and similar pleadings were subsequently filed by the Liddell Respondents. These claims contended that the county districts, in conjunction with the State, had created and perpetuated a racially dual, metropolitan-wide structure of public education justifying the implementation of a mandatory metropolitan desegregation remedy. *See* City App. A, p. A-42-44. These allegations were denied by the defendants.

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[3] Despite these findings by the District Court and the 1980 holding of the Court of Appeals, the State continues to rely in this Court upon the earlier findings in the District Court's 1979 decision, which found neither the State nor the City Board liable for school segregation in St. Louis, even though that decision was *reversed* by the Court of Appeals. *See, e.g.*, State Pet. at 29 n.28.

While these interdistrict claims were pending, the District Court ordered further implementation of the relief it outlined in 1980 in order to continue the process of dismantling the vestiges of the racially dual school system remaining in the City of St. Louis. *See Liddell v. Board of Education*, 677 F.2d 626, 628 (8th Cir.), *cert. denied*, 459 U.S. 877 (1982) (*"Liddell V"*) (noting that "30,000 black students still attend all-black schools" in St. Louis). This included an order that the State defendants pay transportation and related costs of a voluntary interdistrict transfer plan that had been developed pursuant to paragraph 12(a) of the 1980 order, under which black City students and white county students from districts which chose to take part could participate in voluntary interdistrict transfers. The State defendants protested, claiming that the order violated *Milliken v. Bradley*, 418 U.S. 717 (1974) (*"Milliken I"*), and that sufficient findings of State liability had not been made. As in 1981, the Eighth Circuit rejected these arguments on the basis of the established liability of the State defendants for segregation within the City and on the authority of *Hills v. Gautreaux*, 425 U.S. 284 (1976). *Liddell V*, 677 F.2d at 630.[4] As in 1981, this Court denied certiorari. 459 U.S. 877 (1982).

The Settlement Agreement

Shortly before trial of the interdistrict claims in February, 1983, the parties announced that, with the as-

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[4] The Court of Appeals also held that the established liability of the State defendants and the City Board permitted the District Court to require them to take additional steps to "help eradicate the remaining vestiges of the government-imposed school segregation in city schools, including actions which may involve the voluntary participation of the suburban schools." *Id.* at 641. The court noted that such steps could include, for example, additional financial incentives for county districts to participate in voluntary interdistrict programs, more magnet schools to attract county students, and improvements in the quality of education in the remaining all-black City schools. *Id.* at 641-642. All of the foregoing elements were included in the Settlement Agreement approved below.

sistance of a court-appointed special master, an Agreement in Principle had been reached to settle the interdistrict claims against the 23 St. Louis County districts.[5] A proposed Settlement Agreement was filed on March 30, 1983, and was accepted by the three groups of plaintiffs in the interdistrict phase of the case—the City Board, Liddell and Caldwell Respondents—and by all 23 St. Louis County school districts.[6]

The Settlement Agreement is designed to provide further relief for black students attending one-race schools in the City of St. Louis. It contains desegregation measures that build upon the paragraph 12(a) voluntary interdistrict transfer plan and the 1980 desegregation order.[7] It also implements some specific steps which the Eighth Circuit suggested in its 1982 opinion were justified in view of the established liability of the State and

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[5] The City asserts that it was "excluded" from the settlement negotiations. City Pet. at 3. There is no support in the record, however, for this claim, and the City never raised it below. Nor is there any indication that the court-appointed special master, under whose auspices the negotiations took place, would have rejected a request by the City to participate actively. In fact, several months before the case was settled, the City sought unsuccessfully to withdraw altogether from the case. *See* Order of December 29, 1982 [H(1870)82]; City App. A at p. A-10-11. The State also participated actively in the settlement negotiations, although it ultimately decided not to sign the Settlement Agreement. *See* Transcript of Fairness Hearing of May 13, 1983 at 6 (statement of Assistant Attorney General Marshall) (stating that State defendants' "input was of some assistance" in negotiations).

[6] At the time the Settlement Agreement was filed, St. Louis County also informed the District Court that, assuming the Agreement was acceptable to the county school districts, the county had "no objection that the Settlement Agreement as drafted be implemented according to its terms." *See* Position of St. Louis County Government Defendants Regarding Settlement Agreement [H(2239)83] (filed April 4, 1983) at 2. The county has now contradicted its previous position in its brief filed with this Court supporting the City's petition for a writ of certiorari.

[7] At the time of the Settlement Agreement, 15 of the 23 St. Louis County school districts were participating in the paragraph 12(a) voluntary plan.

the City Board. *Liddell V*, 677 F.2d at 641-42; *see* note 4, *supra*.

Contrary to the State's implication that the agreement required or "called for busing more than 15,000 students," State Pet. at 5, the agreement is completely voluntary and no student is required to participate. It is designed to give all black students attending one-race schools in the City a choice between transferring to predominantly white schools in the county districts or attending schools in the City in which the vestiges of segregation have been removed to the maximum extent practical by *Milliken II*-type ancillary relief. Like the paragraph 12(a) plan, the agreement provides for voluntary interdistrict transfers between City and county schools. Each county district which receives enough transfers within five years to satisfy specified desegregation goals will obtain a final judgment. To attract suburban students to the City, and to provide additional relief for black City students, the agreement creates additional magnet schools and general improvements in the quality of education in the City schools, similar to those contained in the 1980 desegregation order. As in the 1980 order, the agreement also provides for special educational improvements for black City students remaining in one-race schools. *See* City App. K, p. A-410.

The District Court's Order

The Settlement Agreement was conditional upon court approval pursuant to Fed. R. Civ. P. 23(e), and upon a court order requiring the parties previously found liable—the State and the City Board—to finance the plan in order to provide further desegregation relief. *See* Settlement Agreement [H(2217)83] at X (A), (B) (3), City App. C at p. A-125, 127. Beginning on April 28, 1983, the District Court conducted a five-day hearing concerning the fairness, reasonableness, and adequacy of the Settlement Agreement. This hearing also considered the extent to which the State and the City Board could be ordered to fund the Settlement Agreement on the basis of

their proven liability for intradistrict segregation. Extensive evidence was presented at the hearing concerning the importance of the compensatory and remedial educational programs and other components of the plan to the achievement of successful desegregation.[8] In addition to oral testimony, the court received 42 written statements from interested persons, proposed findings from the parties, and public statements from community leaders and groups. These included favorable statements concerning the plan issued by the presidents of St. Louis colleges and universities, numerous area religious leaders, both United States Senators from Missouri, and a number of education and civic groups.[9] The State and the City presented evidence seeking to attack the proposed financing of the plan and claiming that the relief to be ordered against

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[8] *See, e.g.*, Transcript of April 28, 1983 Fairness Hearing ("April 28 Tr.") at 1-40 (testimony of Dr. James DeClue); *id.* at 1-70-80, 83-85 (testimony of Dr. Robert Dentler); *id.* at 1-135-140 (testimony of Dr. Jerome Jones); May 13 Tr. at 44-46, 54 (testimony of Dr. Evelyn Luckey). Dr. Dentler testified that the plan would have been "flawed beyond hope" without such compensatory and remedial educational programs. April 28 Tr. at 80. The State itself agreed that two specific programs, the "early childhood program" and the "instructional management system," had been "advocated" by its own Department of Elementary and Secondary Education and "should rightfully be part of this quality education package." May 13 Tr. at 9 (statement of Assistant Attorney General Marshall). In addition, the District Court had previously received testimony concerning the importance of such programs during earlier phases of the case, including from witnesses proffered by the State defendants. *See, e.g.*, Transcript of March 1, 1982 12(c) hearing ("March 1 12(c) Tr.") at 23-24, 40-41 (testimony of former St. Louis School Supt. Robert Wentz); *id.* at 113 and March 3 12(c) Tr. at 145 (testimony of Dr. Gordon Foster); March 2 12(c) Tr. at 18-19 (testimony of Dr. Robert Dentler); *id.* at 160, 172-173 (testimony of Dr. Albert Walker, witness for the State); March 24 12(c) Tr. at 52 (testimony of Dr. Herbert J. Walberg, witness for the State); *id.* at 128-129 (testimony of Dr. Gary Orfield).

[9] *See* Joint Response of City Board, Caldwell and Liddell Plaintiffs to Comments from the Public [H(2281)83] (filed April 11, 1983) at 2-4 and App. A-G; April 28 Tr. at 1-37-38; May 13 Tr. at 60-61; H(2539)83 (filed July 27, 1983).

the State was not warranted by the liability proven.[10] In addition, the Association presented written and oral objections concerning the adequacy of the plan's compensatory and remedial educational provisions and the allegedly disparate impact of the plan on some class members.[11]

In its order of July 5, 1983, the District Court approved the Settlement Agreement for implementation beginning in September, 1983. On the basis of the prior finding of intradistrict liability, the court also ordered the State defendants and the City Board to finance the plan, explicitly stating that the "sole purpose for the expenditure of funds under this Plan is to carry out the constitutional responsibility to remove the vestiges of [the] segregated school system" in the City of St. Louis which they had created and perpetuated, and that "all proposed expenditures must be justified on this basis." City App. A, p. A-33. The July 5 order provided that the State defendants would be responsible for the costs of voluntary interdistrict transfers, magnet schools, and certain part-time and alternative integrative programs, plus one-half the cost of the compensatory and remedial programs in the City schools and capital improvements pursuant to the plan. *See* City App. A, p. A-2-3.

In its July 5 order, the District Court held that the City Board was required to fund the other half of the costs of the compensatory and remedial programs and capital improvement components of the plan. *Id.* Evidence was presented that the City Board would be unable both to maintain its regular educational programs and to comply with its desegregation responsibilities unless additional revenues were made available.[12] The court

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[10] *See, e.g.*, May 13 Tr. at 8-9 (statement of Assistant Attorney General Marshall); *id.* at 94-95 (testimony of George Otte, witness for the City); May 16 Tr. at 165 (testimony of Otis Baker, witness for the State).

[11] *See* April 29 Tr. at 3-20-31.

[12] *See* April 28 Tr. at 140-141, 144-145, 147 (testimony of St. Louis School Supt. Jones). State law severely limits the City

thus ordered the City Board to defer a reduction in its operating tax levy which had been scheduled as a result of the passage of Proposition C (Mo. Rev. Stat. § 164.013) insofar as necessary to meet the City Board's desegregation obligations. *See* City App. A, p. A-4. The court's order thus maintained—not increased—the existing tax rate in the City. The court indicated it would consider an appropriate order to raise additional revenue, but only if proven necessary. *See* City App. A, p. A-35.

The Court of Appeals' Opinion

In an *en banc* decision, the Eighth Circuit affirmed the District Court's July 5 Order with substantial modifications. Based upon the previous findings of liability and its earlier decisions, the appellate court upheld the District Court's ruling that the State defendants and the City Board could be ordered to fund the plan to desegregate further the City schools. *See* City App. K, p. A-407-408. The Eighth Circuit approved the July 5 Order with respect to voluntary interdistrict transfers between the City and the county districts, magnet schools in the City, compensatory and remedial educational programs for one-race schools, and the extension of such programs to the target City schools which became integrated as a result of the 1980 order insofar as necessary to achieve the quality of educational programs required for successful desegregation.

The court declined to approve the District Court's order that the State defendants fund magnet schools in county districts or transfers between one county district and another. It also declined to approve the District Court's order that compensatory and remedial educational

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Board's ability to raise revenues. It requires approval by two-thirds of the City's voters for the issuance of bonds or any tax increase significantly above the current level. *See* Mo. Const. art. VI, § 26(b); art. X, § 11(c). Indeed, as recently as June 5, 1984, a majority of City voters approved a proposed tax rate increase and bond issue to help fund the desegregation plan, but these proposals failed because they did not receive the two-thirds vote required under State law.

programs be extended to the target City schools which became integrated as a result of the 1980 order where the record did not adequately support the need for such programs to remedy the existing constitutional violation. The appellate court thus effectively eliminated all or part of 13 such programs.[13] Finally, the court held that, although evidence had been presented concerning the need for additional City Board revenues to finance the plan, the lower court had not made a specific factual finding that there were no adequate fiscal alternatives to deferring the property tax reduction. Accordingly, the Eighth Circuit ordered that the reduction take effect in 1984-85 unless such findings are made. City App. K at p. A-455.

Recognizing that its opinion would require modification of the agreement and a reduction in the cost of the plan, the Eighth Circuit required the parties to decide promptly if they wished to continue to participate in the agreement. *See* City App. K, p. A-408a. All parties did agree to continue with the plan. *See* Order of March 28, 1984 [H(3000)84]. Despite the claims of the State and the City (*see, e.g.*, City Pet. at 19, State Pet. at 2), the fiscal year 1984 cost of the plan, even if the compensatory and remedial components and other programs approved by the District Court were implemented in full, was budgeted for $33.4 million. The City Board has

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[13] *Id.* at p. A-407-408, 443-445; City Board's Status Report on its Compliance with the Eighth Circuit's Instructions Pertaining to Quality Education Programs Under Settlement Plan and Request for Reductions in State Payments for 1983-84 [H(3022)84] (filed April 2, 1984) at 4, 6, Attachment 3. Examples of programs which were cut or eliminated for targeted integrated schools include: curriculum supervision; lowering of certain pupil/teacher ratios; and provision of additional counselors for integrated elementary schools. *Id.* In addition, the Court of Appeals imposed cost and related limitations on new part-time integrative programs, the total number of interdistrict transfers, compensatory programs in all-black schools, and capital improvements. The court also required review of proposed future expenditures by a five-person budget committee on which the State is to have two representatives. *See* City App. K, p. A-434, 442-443, 446-447, 458.

recently estimated that the cost will actually be less than $27.4 million, of which less than $18.7 million is to be paid by the State.[14] The State itself has recently stated in the court below that based upon the Court of Appeals' opinion, its "settlement plan budget for fiscal year 1984 should be on the order of $10.5 million." [15]

Experience Under the Settlement Agreement

While these court proceedings have been pending, the 1983-84 school year began in the City of St. Louis and in St. Louis County. As the Court of Appeals noted, 2,294 black students from the City have been voluntarily

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[14] *See* Amended Settlement Plan Budget of City Board [H(2878)84] (filed Feb. 1, 1984) at 3-4; City Board's Status Report on its Compliance with the Eighth Circuit's Instructions Pertaining to Quality Education Programs under Settlement Plan and Request for Reduction in State Payments for 1983-84 [H(3022)84] (filed April 2, 1984) at 7, Attachments 1, 2, and 4. The Budget Review Committee recently has recommended (over the City Board's objection) that the State's share be further reduced to approximately $10.9 million. Budget Review Committee Report on Disputes Concerning 1983-84 Settlement Plan Funding Obligation [H(3150)84] (filed June 13, 1984) at 9. The City Board's estimate and the Budget Review Committee's recommendation do not include costs associated with interdistrict transfers. Those costs will depend upon the precise number of transfer students. Prior to the Court of Appeals' opinion limiting such transfers, the costs were estimated by the signatories to the plan to be about $7.2 million. *See* Settlement Plan Summary of Costs (filed with Eighth Circuit Court of Appeals on September 28, 1983). Although no final 1984-85 budget has yet been determined, costs will be somewhat higher next year, in part because one-time start-up and renovation expenditures will be required then for certain magnet school and other programs. *See* Order of July 12, 1984 [H(3220)84]. Such costs are subject to the budget control procedure established below. Hearings on the 1984-85 budget were underway at the time of the filing of this Brief. *See* note 13, *supra*.

[15] State Appellants' Response to Caldwell Plaintiffs' Motion for Attorneys' Fees and Costs (8th Cir., filed April 30, 1984) at 5. *See also* Second Quarterly Progress Report on the Settlement Plan—Financial Advisor's Report [H(3071)84] (April 23, 1984) ("Second Quarterly Report") at 6 (court-appointed financial advisor reporting that "[a]ll data indicate that even recent revised budget appropriations will be underspent this year").

attending predominantly white schools in the county under the plan.[16] Another 389 white county students have voluntarily transferred to City schools. *See* City App. K, p. A-414. An additional 4,167 students have applied for City to county transfers for the 1984-1985 school year, and another 466 students have applied for county to City transfers for the same year. *See* Letters from the Executive Director of the Voluntary Inter-district Coordinating Council [H(3256)84] (dated July 18, 1984) and [H(3289)84] (dated July 25, 1984).[17] The Council which helps operate the plan, has reported to the District Court that the program shows every sign of success. "From both the students' as well as the receiving districts' perspectives, indications are that student adjustment has been excellent, programs are being coordinated to meet student needs, and that both student and staff attitudes are positive and receptive." Letter from Executive Director of the Voluntary Inter-district Coordinating Council [H(2729)83] (dated October 7, 1983). Desegregated education is now becoming a reality for the children of the City of St. Louis.

SUMMARY OF ARGUMENT

The primary arguments raised by Petitioners simply restate claims raised unsuccessfully by the State on prior occasions in this Court and the courts below, claims which this Court has repeatedly declined to review. Contary to the assertion of the City and State Petitioners, the decision below does not impose a mandatory metropolitan remedy in violation of *Milliken v. Bradley*, 418 U.S. 717 (1974) (*"Milliken I"*). The only mandatory relief ordered was to require the State and the City Board,

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[16] The 15,000 transfer figure contained in the State's Petition at 5 refers to the total number of transfers projected to be reached by the fifth year of the plan.

[17] Early experience under the Settlement Agreement demonstrates that the percentage of white students in the City school system is increasing, reversing a long downward trend. *See* Seventh Report of the City Board [H(2760)83] (filed October 31, 1983) at 40.

both adjudicated constitutional violators in connection with system-wide segregation in the City of St. Louis, to provide financing for further desegregation relief for City students, in cooperation with county districts which have voluntarily agreed to participate pursuant to the Settlement Agreement. This is fully consistent with *Milliken I* and *Hills v. Gautreaux*, 425 U.S. 284 (1976), because only parties found liable have been compelled to participate, and because the remedy ordered by the District Court is intended to alleviate the remaining vestiges of the dual system in the City of St. Louis for which the State defendants and the City Board have been found responsible. It is also consistent with *Milliken v. Bradley*, 433 U.S. 267 (1977) (*"Milliken II"*), because the Court of Appeals specifically found that the remedies it approved were tailored to the nature and scope of the proven violation: the confinement of black students to inferior quality one-race City schools. The Court of Appeals has properly applied the relevant legal principles to the particular facts in St. Louis.

In addition, the City's petition claims repeatedly that the courts below have somehow engaged in improper judicial levying of taxes to finance the further desegregation relief ordered in St. Louis. This allegation reflects a fundamental misinterpretation of applicable law and of the decisions below. Neither the Court of Appeals nor the District Court ordered the City Board or any other entity to raise its tax rate. Instead, both courts specifically held, pursuant to *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964), that no court-ordered increase would be proper unless and until it is proven essential to remedy unconstitutional segregation and its vestiges. While the District Court had ordered the deferral of a scheduled property tax reduction based on evidence that continuation of the present tax rate was necessary to help finance desegregation, the Court of Appeals held that this order must be dissolved unless the District Court makes further explicit findings that such funding is absolutely necessary for effective desegrega-

tion and that no alternative source of funding exists. The Court of Appeals properly allowed the order to remain in force through the end of the 1983-84 school year as an interim measure in order to avoid disruption in mid-year, as this Court has done in numerous school desegregation and other cases.

Petitioners have thus failed to show that the decision of the Eighth Circuit in this case conflicts with any decision of another Court of Appeals or of this Court. *See* Supreme Court Rule 17.1(a), (c). On the contrary, the court's opinion reflects the application of established principles of law to the particular facts of this case, and does not present any issues of general applicability worthy of review by this Court.

REASONS FOR DENYING THE WRIT

1. Both the City and the State claim that the decision below "implemented a metropolitan remedy, based on findings that proven violations affected only a single school district." City Pet. at 19. *Accord*, State Pet. at i. This claim echoes the virtually identical arguments unsuccessfully raised by the State in prior arguments to this Court and the courts below. *See* p. 7, *supra*.[18] It also reflects a fundamental misunderstanding of the District Court's order.

Relief was ordered below only against the State and the City Board. Both remain obligated to dismantle the dual system in the City of St. Louis for which they have been found liable. Precisely as with the earlier voluntary

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[18] *See* State's Petition for a Writ of Certiorari in No. 80-7152 (filed June 17, 1981) at 20 (claiming that the "District Court exceeded its authority in ordering the preparation of a plan of voluntary exchanges between the St. Louis School District and nonparty school districts" based on "an intradistrict violation"); State's Petition for a Writ of Certiorari in No. 81-2022 (filed April 30, 1982) at 7 (claiming that lower courts approved "an inter-district remedy without first finding an inter-district violation"). *See also* City App. K at p. A-417-419 (discussing previous unsuccessful State attempts in this Court and the Court of Appeals to attack orders requiring State to fund voluntary interdistrict transfers).

interdistrict 12(a) plan, which the State attacked unsuccessfully in the Court of Appeals and in this Court, the District Court ordered the State and the City Board to help finance and implement a voluntary plan involving the cooperation of suburban districts in order to further remedy school segregation in the City. Indeed, the District Court's order was essentially an expanded version of the previous voluntary plan. Contrary to Petitioners' suggestions, the District Court expressly stated that it was ordering this relief for the "sole purpose" of fulfilling the "constitutional responsibility to remove the vestiges of a segregated school system." City App. A, p. A-33.

As the District Court and the Court of Appeals recognized, this Court's decisions in *Milliken I* and *Hills v. Gautreaux*, *supra*, fully support this order. Unlike *Milliken I*, no relief was ordered against suburban jurisdictions that have not been found liable. *See Milliken I* at 721-722. Instead, as in *Gautreaux*, constitutional violators were required to implement a plan extending beyond the boundaries of a city in order to help relieve segregation found to have been caused by them within the city. *Id.*, 425 U.S. at 297-300 (affirming order requiring Department of Housing and Urban Development ("HUD") and Chicago Housing Authority ("CHA") to implement a plan which extended beyond the City of Chicago, but which did not require suburbs to participate, in order to help remedy housing segregation caused by HUD and CHA within the city). As in *Gautreaux*, the fact that the wrong committed by the State was within the city does not prevent the courts from ordering relief involving the voluntary cooperation of suburban districts.[19]

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[19] The State's attempt to distinguish *Gautreaux* is unconvincing. HUD and CHA were both found liable for segregated housing violations within the Chicago city limits, just as the State of Missouri and the City Board were found liable for segregated schools within the City of St. Louis. Just as HUD had authority to act beyond the geographical limits of the City of Chicago, the State of Missouri has state-wide responsibility for establishing and maintaining public schools throughout the State. Mo. Const. art. IX § 1(a). Just

The State nevertheless argues that the relief ordered below is improper. Without citing anything in the record, the State asserts that the "numerous . . . one-race schools" in the City of St. Louis may be the result of "a racial distribution caused by personal choices regarding housing or employment or other factors not attributable to proven unconstitutional conduct by the State." State Pet. at 20. This claim is nothing more than a warmed-over version of defendants' previous argument, which was specifically rejected by the Court of Appeals in 1980, that school segregation in the City of St. Louis was caused by factors over which defendants "had no control," such as "discriminatory private policies" and "general population movements unrelated to any specific governmental policies." *Adams v. United States, supra*, 620 F.2d at 1291. Both the Court of Appeals and the District Court found in 1980 that the remaining segregation and one-race schools in the City of St. Louis were a vestige of the *de jure* segregated system and other unconstitutional conduct of the State and the City Board. This Court denied certiorari. *See* City App. K at p. A-408c-408d; p. 3-6, *supra*.[20] The State's attempt to re-

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as it was appropriate for HUD to be ordered to construct public housing outside the Chicago city limits with the consent of suburban governmental entities in order to help remedy segregated conditions in the city for which HUD was liable, it is appropriate in this case to require the State of Missouri to fund voluntary interdistrict transfers outside the City of St. Louis with the consent of St. Louis County school districts in order to help remedy segregated conditions in the City for which the State is liable.

[20] These rulings are consistent with this Court's decision in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 18, 26 (1971) ("*Swann*"), where this Court held that the existence of one-race schools establishes a "*prima facie* case of violation of substantive constitutional rights," and that defendants have the burden to establish that such schools are "not the result of present or past discriminatory action." The State's speculation in its petition concerning other possible causes of one-race schools in St. Louis clearly fails to satisfy its burden under *Swann*. *See also Keyes v. School District No. 1*, 413 U.S. 189, 207-213 (1973) (explaining the burden on defendants of justifying the existence of remaining one-race schools).

litigate in this Court this settled factual question does not raise an issue worthy of review.

2. The City, State, and the United States also maintain, as the State has previously argued to this Court, that the remedies ordered below, particularly the compensatory and remedial programs for City schools ordered pursuant to *Milliken II*, exceeded the scope of the constitutional violation proven. Petitioners and the United States have misread the decision below and the relevant case law.

As this Court has explained, a desegregation remedy "does not 'exceed' the violation" where it is "tailored to cure the '*condition* that offends the Constitution' "—in this case, the vestiges of *de jure* system-wide school segregation in the City of St. Louis. *Milliken II*, 433 U.S. at 282 (emphasis in original). The Court of Appeals acknowledged and adhered to this principle. It reviewed applicable legal precedents regarding the need for such components in order to overcome "the inequalities inherent in dual school systems," beginning with this Court's holding in *Milliken II*. City App. K, p. A-436, 437-38. Based on the extensive evidence presented to the District Court (*see* p. 9-11, *supra*), the Court of Appeals then proceeded to analyze carefully each aspect of the relief ordered. *See* City App. K, p. A-420-448. The appellate court approved only those components which the record demonstrated were necessary to correct the vestiges of the former dual system, namely the remaining one-race, inferior schools in the City. The order below gives each of the 30,000 students attending those schools the choice of attending a magnet school, a regular City school improved by *Milliken II* programs, or an integrated school in a county school district. *See* City App. K, p. A-445, A-460. The Court of Appeals reversed the District Court as to all programs which did not meet this exacting standard, such as student transfers between county districts, county magnet schools, and all or part of 13 components of the compensatory and remedial portion of the plan. *Id.* at A-407; *see* p. 12-13 *supra*. This procedure

conforms precisely to the standards established by this Court. Petitioners and the United States offer no basis for asking this Court to review the Court of Appeals' detailed application of the *Milliken II* standards to the facts of this case.

Contrary to the State's assertion, it is no "curious accident" that the Court of Appeals found that the programs included in the Settlement Agreement as modified (as distinguished from the broader remedies sought in the interdistrict complaints), were tailored to remedy the remaining vestiges of the constitutional violation. *See* State Pet. at 26. *See also* Brief for the United States at 23. The parties who negotiated the settlement were keenly aware that they were drafting a plan that had to be sufficiently tailored to the existing intradistrict liability findings to warrant a court order requiring their funding and implementation. For this reason, they drafted the compensatory and remedial education provisions in accordance with similar provisions in the 1980 order. *See* p. 8, *supra.* The parties also expressly relied upon the 1982 Court of Appeals opinion suggesting the types of additional desegregation relief that could be ordered against the State and the City Board based upon the existing record. *See Liddell V*, 677 F.2d at 641-642, cited at Settlement Agreement [H(2217)83] at X (B)(3), City App. C at p. A-127. Contrary to the argument presented by Petitioners and by the United States, it is thus clear that the remedy has been carefully tailored to the existing intradistrict violation.[21]

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[21] The State further asserts, relying on *United States v. City of Miami*, 664 F.2d 435 (5th Cir. 1981) (*en banc*), that since it is not a consenting party to the Settlement Agreement, the Court may not "approve ramming a settlement" down its throat. State Pet. at 15 n.13. The decision in *City of Miami*, however, is irrelevant to this case. There the court declined to approve that portion of a settlement agreement that affected the rights of a non-consenting third party. In *City of Miami*, unlike this case, there was never any finding of liability on the part of the third party. In contrast, the court here properly ordered the State to fund the Settlement Agreement based on the established findings of State liability for the unconstitutional conditions that the order seeks to remedy.

Petitioners' cramped view of the appropriate nature of desegregation remedies squarely contradicts this Court's prior holdings. This Court has charged state and local authorities with the responsibility to take "whatever steps might be necessary" to eliminate "all vestiges of state-imposed segregation" from the schools. *Swann*, 402 U.S. at 15; *accord*, *Columbus Board of Education v. Penick*, 443 U.S. 449, 459 (1979) (*"Columbus"*). When such authorities fail to do so, the courts are not limited—as Petitioners assert—to a fanciful and futile effort to try to recreate "things as they would have been." State Pet. at 19. *See also* City Pet. at 22. As this Court has explained, it is not possible simply "to turn back the clock." *Ford Motor Co. v. United States*, 405 U.S. 562, 573 n.8 (1972). Instead, so long as the objective is to "cure the condition that offends the Constitution," the "scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Milliken II*, 433 U.S. at 281, 282 (approving remedial reading and other compensatory programs despite argument that "the court's decree must be limited to" student reassignments since "the constitutional violation found" was "the segregation of students on the basis of race").[22] Following the example of this Court's decision in *Milliken II* and numerous other appellate court holdings, the court below properly ordered the use of compensatory programs and other relief to remedy the vestiges of the unconstitutional *de jure* segregated system in St. Louis.[23]

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[22] *Accord*, *Swann*, 402 U.S. at 15. This Court has recognized the same principle in other types of cases involving equitable relief. *E.g.*, *Ford Motor Co.*, 405 U.S. at 573 n.8 (explaining that equitable decrees in antitrust cases should seek to "*cure the ill effects* of the illegal conduct" and are not limited to "restoration of the *status quo ante*") (emphasis in original).

[23] *See, e.g.*, *Arthur v. Nyquist*, 712 F.2d 809 (2d Cir. 1983), *cert. denied*, 52 U.S.L.W. 3756 (1984); *Berry v. School Dist. of Benton Harbor*, 698 F.2d 813 (6th Cir.), *cert. denied*, 104 S. Ct. 236 (1983); *United States v. Texas Educ. Agency*, 679 F.2d 1104 (5th Cir. 1982); *Evans v. Buchanan*, 582 F.2d 750 (3d Cir. 1978) (*en banc*),

The reliance of Petitioners and of the United States on this Court's decision in *Dayton Board of Education v. Brinkman*, 433 U.S. 406 (1977) ("*Dayton I*"), to contradict these holdings is misplaced. In *Dayton I*, this Court held that the district court had improperly ordered a system-wide remedy where the violation proven had "included at most a few high schools." *Dayton Board of Education v. Brinkman*, 443 U.S. 526, 540-541 (1979) ("*Dayton II*"). As this Court made clear in *Columbus*, the holding in *Dayton I* is limited to situations where "only a few apparently isolated discriminatory practices had been found," making a systemwide remedy inappropriate. *Columbus*, 443 U.S. at 465-466.[24] In this case, as in *Columbus* and *Milliken II*, the State and the City Board are responsible for systemwide, *de jure* segregation in the City of St. Louis, and the remedy was designed to redress the effect of "[t]he 'condition' offending the constitution." *Milliken II*, 433 U.S. at 282. The ruling in *Dayton I*, where this Court held that it was necessary to define and seek to remedy the incremental effects of specific identifiable constitutional violations, is simply inapplicable.[25] Thus, the findings below met the

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cert. denied, 446 U.S. 923 (1980); *United States v. Texas*, 447 F.2d 441 (5th Cir. 1971), *cert. denied*, 404 U.S. 1016 (1972); *United States v. Jefferson County Bd. of Educ.*, 380 F.2d 385 (5th Cir.), *cert. denied*, 389 U.S. 840 (1967).

As the Court of Appeals recognized, Petitioners' heavy reliance on *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973), is misplaced. Where, as here, a case involves "a suspect class (race) and an established constitutional violation (a *de jure* school system)," the courts have "repeatedly endorsed compensatory and remedial efforts to overcome educational inadequacies caused by segregated schools, *Rodriguez* notwithstanding." City App. K, p. A-440 n.7.

[24] Unlike the decisions relied upon by the State, this case involves the vestiges of a state-mandated *de jure* segregated school system, not individual "findings of segregative acts" warranting only limited relief. *Compare Brennan v. Armstrong*, 433 U.S. 672 (1977) (cited at State Pet. at 19).

[25] *Dayton I* similarly does not justify remand to the District Court for additional findings. As discussed at p. 12-13, 20-21,

standards set forth in *Dayton II*, *Milliken II* and *Columbus* and, in any event under well-established legal principles, the adequacy of those findings does not present a question worthy of this Court's review.

3. The City's claim that the courts below have engaged in "judicial taxation," City Pet. at 10, misconstrues the decisions below. The District Court merely stated that, after future hearings, it would consider as a matter of last resort authorizing a property tax increase in St. Louis if proven essential to ensure adequate funds for desegregation, and the court expressly reserved for a later date the question of whether such an order would be necessary. City App. A, p. A-35. In deference to the applicable principles of comity and federalism, the Court of Appeals also made it clear that such an order would be permissible under *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964), only "after exploration of every other fiscal alternative." City App. K, p. A-449. Accordingly, there is no present controversy concerning the propriety of such an order, and any ruling by this Court concerning that issue would be purely advisory.[26] The City's challenge to the validity

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supra, the Court of Appeals reviewed in detail each aspect of the relief ordered and made specific findings concerning the remedies it upheld. Contrary to the argument presented by the United States, there was no impropriety in the appellate court's making such factual findings based upon the trial record. Indeed, the findings made by the Court of Appeals in this case were even more detailed than the appellate court findings relied upon by this Court in upholding the system-wide remedy in *Dayton II*. *Id.*, 443 U.S. at 540-541. The United States' suggestion that the Court summarily vacate the decision below and remand for additional findings is simply unrealistic. Such an order would completely and unnecessarily disrupt the voluntary desegregation plan now in effect and would fatally undermine the Settlement Agreement so carefully negotiated among the parties.

[26] This Court has made it clear that it does not issue advisory opinions on hypothetical questions. *Federal Communications Comm'n v. Pacifica Found.*, 438 U.S. 726, 735 (1978). *Accord, e.g., Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956) (noting that this Court "reviews judgments, not statements in opinions").

of a hypothetical future order which may or may not require the raising of additional tax revenues does not warrant review by this Court.[27]

The only action below relating to tax revenues was the decision by the District Court ordering the maintenance of the current St. Louis school tax rate and deferring a scheduled property tax rate reduction to the extent "necessary to fund [the] City Board's constitutional obligation." City App. A, p. A-4. This order was based on testimony that the City Board would be unable to maintain its regular educational programs and to comply with its desegregation responsibilities if the tax rate were reduced. *See* p. 11-12, *supra*. Although the Court of Appeals recognized that the record in fact reflected such financial

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[27] The City's contention that federal courts may never order taxes to be levied or spent contradicts squarely the previous holdings of this Court. In *Virginia v. West Virginia*, 246 U.S. 565, 591 (1918), this Court held that the existence of the judicial power to resolve a controversy necessarily implies the existence of the power to "enforce the results of its exertion," including, if necessary, a writ of mandamus directing the legislative body to enact and levy a tax to satisfy the judgment. Numerous other decisions of this Court, including *Griffin*, have recognized the federal court's authority to order municipalities to raise and expend tax revenues where necessary to vindicate constitutional rights or fulfill contractual obligations. *See Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 681 (1978) (acknowledging long line of cases in which this Court has "vigorously enforced the Contract Clause against municipalities—an enforcement effort which included . . . ordering that taxes be levied and collected to discharge federal-court judgments once a constitutional infraction was found"). *Accord, e.g., United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977); *Graham v. Folsom*, 200 U.S. 248 (1906); *Supervisors v. Durant*, 76 U.S. 415 (1869); *Von Hoffman v. City of Quincy*, 71 U.S. 535 (1867). This Court's recognition of the power of federal courts to remedy constitutional violations, including the ultimate power to raise taxes if necessary, is in accord with long-established common law doctrines. *See* cases cited at City App. K, p. A-449-454. Furthermore, the City's reliance on the doctrine of separation of powers is misplaced. As this Court has held, separation of powers "has no applicability to the federal judiciary's relationship to the States." *Elrod v. Burns*, 427 U.S. 347, 352 (1976) (Brennan, J., announcing the judgment of the Court). *Accord, Virginia v. West Virginia, supra*, 246 U.S. at 591.

problems, it held that the District Court should have made an explicit finding that all other fiscal alternatives were insufficient before deferring the rollback. City App. K, p. A-455. Accordingly, the appellate court ruled that the District Court must allow the rollback to take effect in 1984-85 unless such findings are made. *Id.*

Petitioners nevertheless complain because the appellate court in February did not reverse the rollback suspension retroactively to the beginning of the 1983-84 school year. The Court of Appeals, however, was simply applying this Court's consistent holdings that once any legal error has been corrected on appeal, interim measures are permissible in order to avoid disruption even where not consistent with the proper legal result reached on appeal.[28] This principle has been applied by this Court to school desegregation cases as well, including the decision in *Dayton I* relied upon by Petitioners. In that case, even though this Court held that the evidence and findings were inadequate to support the system-wide remedy ordered by the lower courts, the Court approved the continuation of the remedy for the pending and next succeeding school years. *Id.* at 421. Indeed, the appellate court here took a more conservative approach than in *Dayton*, since it held that the deferral may continue only for the remainder of the 1983-84 school year and must

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[28] *See, e.g., Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982) (staying judgment invalidating Bankruptcy Reform Act in order to avoid "impairing the interim administration of the bankruptcy laws"); *Lemon v. Kurtzman*, 411 U.S. 192, 194 (1973) (holding that district court could permit state to reimburse non-public school for educational services performed prior to decision declaring such payments unconstitutional); *Upham v. Seamon*, 456 U.S. 37, 44 (1982) (permitting use of erroneously ordered reapportionment plan as "interim plan" for next succeeding election); *Mahan v. Howell*, 410 U.S. 315, 332-333 (1973) (upholding interim remedy by district court in voting rights case using multi-member districts which would not have been appropriate as final relief); *Allen v. State Bd. of Elections*, 393 U.S. 544, 571-572 (1969) (refusing to apply voting rights decision retroactively to set aside previous elections conducted in violation of applicable law).

end before the school year beginning in September, 1984, unless specific findings justifying its continuation are made.

Thus, the Court of Appeals announced no new principle concerning federal court authority over state and local taxation. Instead, in accordance with its previously expressed concern about avoiding disruption of the desegregation plan in mid-year, it simply left the rollback deferral in place until the end of the school year in June 1984 in order to avoid such disruption.[29] The Court of Appeals' treatment of the rollback deferral issue under the particular circumstances of this case accords with the standards established by this Court and raises no issue warranting review.[30]

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[29] *See Liddell v. State of Missouri*, 717 F.2d 1180, 1183 (8th Cir. 1983) (*"Liddell VI"*) (explaining that issuance of a stay after school year had begun would "necessitate reassigning students and teachers . . . and revising administrative decisions concerning budgeting, orientation and hiring," thereby disrupting "the lives of thousands of students and teachers"). *Accord*, App. B to Supplemental Brief of City Petitioners at A-3 (supplemental opinion of Court of Appeals of March 5, 1984) (describing the "consistent view" of the court "that we will avoid disruption during the school year whenever possible").

[30] In addition to failing to demonstrate that the decision below concerning the tax and rollback issues departs from the decisions of this Court, the City has failed to show any conflict among the circuits. *Plaquemines Parish School Bd. v. United States*, 415 F.2d 817 (5th Cir. 1969) (cited in City Pet. at 15, 23), did not even involve a tax levy. Instead, it concerned an order requiring a school district to seek funds under federal programs, and it was premised on the recognition that adequate funding for desegregation would be forthcoming pursuant to an injunction against the County Commission, which was upheld by the appellate court. *Id.* at 834. In *Evans v. Buchanan*, 582 F.2d 750, 780 (3d Cir. 1978), *cert. denied*, 446 U.S. 923 (1980) (cited in City Pet. at 11, 17, 23, 25, 29), the Third Circuit specifically endorsed the principle of *Griffin v. County School Bd.*, *supra*, that a court has authority to enter a tax order where necessary to protect a desegregation decree, such as where "substantially insufficient funds" are provided to operate a school system. Like the Eighth Circuit below, it remanded to the district

4. Petitioner Association claims that the courts below erred in approving the Settlement Agreement because the agreement allegedly favors the interests of black students who choose to transfer to county schools over the interests of those who choose to remain in City schools. Petitioner further contends that the District Court's alleged failure to give sufficient consideration to Petitioner's objections to the plan amounts to a denial of due process. These arguments were thoroughly addressed by the Eighth Circuit and do not raise any issues worthy of this Court's attention.

Petitioner's arguments totally ignore the fact that the Settlement Agreement provides for a wholly voluntary plan. The option of transferring to suburban districts is offered on an equal basis to *all* black students attending majority-black City schools. *See* Settlement Agreement [H(2217)83] at II(B), City App. C, p. A-69-70. The Settlement Agreement also contains substantial remedial and compensatory relief designed to improve conditions for those students who choose to remain in City schools—relief that was ordered below in order to further remedy established constitutional violations. *See* p. 9, 12, 19-23, *supra*.[31]

Thus, the Eighth Circuit concluded that there was "no evidence in the record to support the claim that the interests of students attending all-black schools are being slighted," since they will now be able either to "attend their neighborhood school, attended an integrated school in the city or county, or attend a magnet school." City

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court because it had not made factual findings sufficient to justify contravening the tax rate approved by the legislature.

[31] Petitioner's reliance on *In re General Motors Corp. Engine Interchange Litigation*, 594 F.2d 1106 (7th Cir.), *cert. denied*, 444 U.S. 870 (1979), is thus misplaced. That case involved a proposed settlement in which plaintiff class members who declined to accept a cash settlement would have had their federal claims dismissed even though they received no relief in return. In contrast, in this case, substantial relief is provided to students who do not elect to transfer out of City schools.

App. K, p. A-460. The Eighth Circuit similarly rejected Petitioner's argument that due process was denied because the District Court allegedly failed to respond in detail to Petitioner's objections to the settlement plan. After careful review, the court held that the District Court's lengthy opinion "reveals that it engaged in a reasoned examination of objections raised by class members concerning whether the plan is fair, reasonable and adequate." City App. K, p. A-461 (*citing Liddell v. Board of Education*, *supra*, 567 F. Supp. at 1042-1047). Petitioner Association has failed to demonstrate that its attempt to relitigate these holdings warrants review by this Court.

5. Finally, the State claims that the decision below "wrongfully interferes with decisions about State programs" and impedes the interest of State authorities in "managing their own affairs," because it involves the expenditure of State funds which could be used for other purposes. State Pet. at 28, 30. Not surprisingly, the State can point to no decision of this Court or a federal court of appeals which supports its assertion that such budgetary or management factors are more important than the constitutional rights of thousands of schoolchildren.

The State's argument necessarily assumes that there are some federal constitutional violations which, for budgetary reasons, the courts are powerless to remedy. That is not and cannot be the law. As this Court has recognized, "it is obvious that vindication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny them than to afford them." *Watson v. City of Memphis*, 373 U.S. 526, 537 (1963).[32] In *Milliken II*, this Court rejected vir-

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[32] *Accord, e.g., Welsch v. Likens*, 550 F.2d 1122, 1132 (8th Cir. 1977) (holding that the "obligation [to comply with constitutional standards] may not be permitted to yield to financial considerations"). Like the State of Michigan in *Milliken II*, the State in this case is free to determine how to finance its responsibilities under the order below. For example, the State could utilize some of its

tually the identical argument raised by the State here: it explained that a "federal court judgment enforcing the express prohibitions on unlawful State conduct" under the Fourteenth Amendment "does not jeopardize the integrity of the structure or functions of state and local government," regardless of its costs. *Milliken II*, 433 U.S. at 291.

The total lack of merit in the State's argument that it should not be ordered to fund the remedy here becomes even clearer when put into historical perspective. Until the middle of the nineteenth century, the State of Missouri outlawed the teaching of black children altogether. For almost one hundred years thereafter, the State required that blacks be educated only in segregated schools. *See Adams v. United States, supra*, 620 F.2d at 1280-81. Even after *Brown v. Board of Education*, 347 U.S. 483 (1954), the State took no effective action to dismantle the racially dual system in the City of St. Louis. *See* City App. K at p. A-408c. Even today, thirty years later, approximately half the City's students remain in one-race schools. The State cannot now claim that it has no responsibility to remedy these conditions. *Compare Cooper v. Aaron*, 358 U.S. 1, 18-19 (1958). Nor can it avoid its responsibility simply by complaining about the costs. The State's unsupported attempt to resurrect such long-discredited arguments fails to present an issue worthy of review by this Court.

CONCLUSION

For the foregoing reasons, the Petitions for a Writ of Certiorari should be denied.

$2.4 billion of general, unearmarked funds for fiscal year 1984 or, as Governor Bond proposed, raise new tax revenues. *See* May 17 Tr. at 22 (testimony of State Budget Director Perry McGinnis); *St. Louis Post Dispatch*, Sept. 14, 1983, at 1. *See also Yaris v. Special School Dist.*, 558 F. Supp. 545, 559 n.7 (E.D. Mo. 1983), *aff'd*, No. 83-1865 (8th Cir. Feb. 24, 1984) (noting that "only one state in the country appropriates less funds than the State of Missouri for its educational system").

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